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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Writer's Direct Dial Number

March 18, 1996

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

RE: Telecommunications Services Inside Wiring
CS Docket No. 95-184

Dear Mr. Caton:

Attached please find an original and nine copies of the "Comments of TKR Cable Company," to be filed in the above-referenced proceeding. Pursuant to paragraph 86 of the Notice of Proposed Rulemaking released January 26, 1996 in this proceeding, please deliver a personal copy of these Comments to each Commissioner.

Please contact the undersigned counsel if you have any questions regarding this submission.

Sincerely yours,

Mark J. Palchick
Attorney for
TKR Cable Company

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OFFICE OF SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Telecommunications Services Inside Wiring	)	**CS Docket No. 95-184**
Customer Premises Equipment	)	

COMMENTS OF TKR CABLE COMPANY

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March 18, 1996

Summary of Argument

The hallmark of the 1996 Telecommunications Act is increased competition for advanced communications services, and the elimination of barriers that restrict competition. The Commission's proposal to change the point of demarcation for MDUs is based on the outmoded theories of competition that there will be a single wire into the home and is directly contrary to the spirit and specifications of the 1996 Telecommunications Act. Competition will occur from multiple providers offering different combinations of broadband and narrowband services over multiple wires. Accordingly, the Commission should no longer assume that competition will come from companies competing to be the sole wire into the home.

Moving the cable demarcation point so that service providers can share the same broadband wire is not in the best interests of subscribers, and will seriously hinder the development of new and advanced telecommunications, information and entertainment services. It is unrealistic to expect more than one service provider to use the same wire at the same time to provide different services to a single customer. The public needs a second or even a third wire into subscriber homes in order to create a truly dynamic marketplace that will provide consumers with affordable, advanced, new communications services.

The Commission must recognize that the MDU business is a very different business from the single family residential business. In MDUs and commercial applications, the end user is rarely the primary point of contact with the cable operator. Property owners and managers make decisions about access to the premises that have a substantial impact on what services the ultimate customer can obtain. In many instances, different occupants in the same MDU or restricted residential area will want different services. However, where the

owner/manager of the property acts as a gate keeper, individuals are often denied services or access to specific providers. In a single family home, the owner/occupant can contract for just the service and service provider of choice. With only a single provider in an MDU, choice is severely restricted. To restrict an operators access to individual units in a building or development is akin to requiring a cable operator to remove its cable from telephone poles simply because some home owners on a block wish to subscribe to a different provider. Moving the current point of demarcation in MDUs will have this very deleterious effect.

The proposed change in demarcation point for MDUs is neither mandated nor permitted under current law. Furthermore, because the cable operators own the inside wiring in MDUs, if the Commission were to require operators to surrender control of that wiring, such action would constitute a taking, which is protected by the Fifth Amendment of the Constitution.

Finally, if the Commission wants to promote competition it must remedy the uneven enforcement of Section 521(a)(2) of the Communications Act and grant full right of way access with the grant of a cable franchise and prevent the appropriation of incumbent provider's property by subsequent providers.

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COMMENTS OF TKR CABLE COMPANY

In response to the Notice of Proposed Rulemaking released January 26, 1996 in the above-captioned proceeding ("NPRM"), TKR Cable Company ("TKR"), by its attorneys, files these Comments.

TKR is a cable operator that provides service to customers in New Jersey, New York and Kentucky. TKR is concerned that the rules adopted pursuant to this NPRM be consistent with the realities of the marketplace and with the Telecommunications Act of 1996's goal of increased competition in the telecommunications marketplace. To achieve these goals, the Commission should recognize that: (i) true competition will require multiple "wires" into the home; (ii) residential and MDU service are different types of service with different legal and practical considerations which make changing the demarcation point for MDUs inappropriate; and (iii) a federal policy for access to MDU and private developments is necessary.

I. COMPETITIVE FRAMEWORK

The Telecommunications Act of 1996[1] ("1996 Telecommunications Act") requires that the Commission facilitate competition among telecommunication providers. Although this Notice of Proposed Rule making was adopted prior to adoption of the 1996 Telecommunications Act. the Commission is still bound by its requirement to promote competition.

Section 257(a) of the Communications Act of 1934, as amended, provides in pertinent part:

> [T]he Commission shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.

This is amplified by section 706 of the 1996 Telecommunications Act, which provides:

> The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ...by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, **measures that promote competition** in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[2]

Competition for narrow and broadband services will occur when more than one provider competes for a customer's business. This assumption is almost a given. However, the

[1] Pub. L. 104-104, 142 Cong. Rec. H1078 (Jan. 31, 1996).
[2] (emphasis supplied).

nature of competition is less clear. Much of the Commission's home wiring rulemakings, and portions of the 1992 Cable Act, are premised on the assumption that the customer will select one provider, at the expense of other providers, for all of its broadband and narrowband needs. This model is the familiar scenario when a customer chooses between providers of multichannel video services, or between providers of long distance services, or between providers of local access services. It was once rare that a customer would subscribe to more than one cable company, long distance telephone company, or local exchange carrier. The selection of a single company to provide a specific type of service is changing, both because of changes in the marketplace and changes from the 1996 Telecommunications Act. It is becoming more and more common for a customer to receive its broadband satellite video services from a direct satellite provider while receiving local television service from a combination of off-air reception coupled with a cable television or MMDS provider. Now that the cable/telco restrictions and local/long distance restrictions have been lifted, customers will be able to select multiple services from multiple providers.

This new model for competition requires different assumptions about how competition will occur. Specifically, the Commission should no longer assume that competition will come from companies competing to be the sole wire into the home. To the contrary, competition increasingly will be through multiple providers offering different combinations of broadband and narrowband services. Accordingly, the Commission's assumption of one wire coming into the home must be abandoned.

In the near future, it will be possible for one competitor to provide cost effective video on demand while another may offer the best value on a package of video programming

services. Given the large number of communications services that are now available, and the rapidly expanding nature of these services, the combinations of services which will be available from different providers will be almost limitless. Examples of communications services which are currently available include video programming, video on demand, near video on demand, interactive game channels like SegaChannel, telephony service, Local Are Networks (LANS), Wide Area Networks (WANS), dedicated lines, point-to-point service, internet access, digital music, and others. In the near future customers will be selecting from different providers to provide different segments of the above communication needs. The Commission's internal wiring rules for broadband services must therefore contemplate multiple wires and not just a single wire.

The fact that there will be multiple wires in the customer's home is clearly reflected in the amendments to the cable television provisions of the Communications Act. While the 1996 Telecommunications Act permits a local exchange carrier to provide broadband video service in its market, and allows a cable operator to provide narrowband service, it specifically prohibits (with some exceptions for rural areas) joint ventures between the local telephone and cable company, or the acquisition of the local cable company or telephone company by the local telephone company or cable company.[3]

Moving the cable demarcation point so that service providers can share the same broadband wire is not in the best interests of subscribers, and will seriously hinder the development of new and advanced telecommunications, information and entertainment services. As explained more fully below, it is currently impracticable for more than one service provider to

[3] See 1996 Telecommunications Act, Section 302(a), new Section 652 of the Communications Act.

use the same wire at the same time. Thus, if only one service provider can use a single broadband wire into a customer's home, the services available to the customer will be limited. In order to reach Congressional and FCC goals of developing and making available new, advanced telecommunications, information and entertainment services, the Commission should promote the availability of additional wires into homes, rather than restricting homes to one broadband wire. Such a policy would recognize that the most likely competitive scenario which will develop in the free market is one in which multiple service providers will offer access to multiple communications services over multiple wires.

It is unrealistic to expect more than one service provider to use the same wire at the same time to provide different services to a single customer.[4] To allow more than one service provider simultaneously to use the same wire, vast amounts of micro-regulation would be required, including frequency coordination, policing, licensing, standardization, and other regulatory measures. Equipment would need to be designed to meet certain technical standards. To insert the signals of another provider, specific filtering is required which would render certain frequencies unusable, and reduce overall signal levels. Even if the necessary regulatory framework were in place, and even if technical considerations were solved to make sharing the same wire possible, technical constraints would prevent individual service providers from expanding the services available over the wire.

If the Commission promotes a policy of one wire per home, therefore, only one provider at a time will be able to offer communications service over that wire. With the customer able to receive the communications services of only one provider at a time, the subscriber's

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[4] See Cable Home Wiring, "First Order on Reconsideration and Further Notice of Proposed Rulemaking," MM Docket No. 92-260, FCC 95-503, at ¶10 (released Jan. 26, 1996) ("First Reconsideration").

service options will be limited. In a one-wire universe, service providers will have little incentive to differentiate their services except by price. Such a scenario is contrary to the whole concept of broadband service which is to accommodate multiple niche uses through one conduit.

The industry needs a second or even a third wire into subscriber homes in order to create a truly dynamic marketplace that will provide consumers with affordable, advanced, new communications services. A single service provider will never be able to provide all possible services over a single wire. Different customers have different communications and entertainment requirements and will undoubtedly desire to pick and choose services that are available from different providers that represent the most value for their individual needs.

For all of these reasons, it makes no sense for the Commission to develop a strategy of promoting competition over a single broadband wire. Because the proposal to relocate the cable demarcation point in MDUs is designed to limit housing units in MDUs to one broadband wire, such a proposal should be rejected by the Commission. In the future, when a communications competitor offers a service (or combination of services) that a subscriber wants, the competitor should take whatever measures are necessary to provide a wire to the subscriber's premises that will allow the subscriber to receive such services. Whether it makes sense for the competitor to pay for a new wire will depend on whether the competitor has enough confidence in the quality of its services to take the risk that a return on its investment will eventually be received.

The business decision of a competitor to install a new wire is precisely the same business decision that TKR and other cable operators have had to make over the years before installing the first broadband wire. It is both fair and economically efficient for competing

providers of communications services to be required to take the same risks that incumbent providers have been required to take. Requiring that competing providers bear the business risk of installing new wires will promote the availability of different communications services by creating the economic incentive for competitors to develop new, valuable, economic communications services which subscribers will value enough to make investment in the new wire profitable.

If TKR were required to surrender its MDU inside wiring to a competitor, and if TKR later were able to develop communications services that are different from those provided by the competitor, it might still make sense for TKR to offer its new services to the current subscriber. If the subscriber wanted TKR's services in addition to the services of TKR's competitor, TKR would make the investment to run another wire into the customer's unit. Such a scenario, however, would be completely unfair to TKR, because TKR would be in a far worse position than TKR's competitor is in currently. TKR, like its competitor today, would need to make a business decision whether its services were desirable enough to warrant the expense and risk of providing a second wire into the home. Moreover, the situation would be unbearable if no provision were made for TKR to recover the fair market value of its first wire. TKR in that case would pay twice for the same wire, just to allow its competitor a free ride. Such a situation would not only be grossly unfair to TKR, it also makes little sense from a competition standpoint.

If different services are to compete for different segments of a customer's communications business, the inside wiring rules must promote multiple wires into the home, especially in MDU and commercial applications. The present cable demarcation rules, as they

apply to MDU and commercial applications, will facilitate multiple wires into individual subscribers' homes. Therefore, the Commission should not adjust its demarcation rules which allow competing services to maintain their existing facilities up to the point of demarcation, and should not move the existing points of demarcation.

II. MULTIPLE DWELLING UNIT AND RESIDENTIAL WIRING ARE DIFFERENT

Many of TKR's systems are located in relatively urban areas, and as a result TKR estimates that approximately 25% of its subscribers are located in multiple dwelling units ("MDUs"). Because of the large number of TKR subscribers located in MDUs, and because of the enormous investment and risk associated with TKR's provision of cable service to its MDU subscribers, TKR is greatly concerned with the Commission's request for comments regarding movement of the cable demarcation point in MDUs. As will be shown below, the Commission must treat the regulation of residential and multiple dwelling unit (MDU) wiring differently for both practical and legal reasons.

The MDU business is a very different business from the single family residential business. In the single family residential business, the point of contact with the cable operator is usually the owner or occupant of the premises. In MDUs and commercial applications, the end user is rarely the primary point of contact with the cable operator. Property owners and managers make decisions about access to the premises that have a substantial impact on what services the ultimate customer can obtain. In many instances, different occupants in the same MDU or restricted residential area will want different services. However, where the owner/manager of the property acts as a gate keeper, individuals are often denied services or

access to specific providers. In a single family home, the owner/occupant can contract for just the service and service provider of choice. With only a single provider in an MDU, this choice is severely restricted.

In a residential unit, the amount an operator pays for wiring is often minimal. Generally, the wiring paid for by the operator in a residential application is limited to the minimum amount necessary to deliver a specific level of service. The wiring of an MDU is much different. Operators make a substantial investment when wiring an MDU. TKR estimates that it spends between $135 and $220 per unit to wire an MDU building for cable service. This average cost includes both "pre-wire" activities and "post-wire" activities. A "pre-wire" is wiring done while the MDU is being built. Pre-wiring requires at least one wire to be installed to each unit from a common point, usually located outside the building or in a common basement area. With pre-wires, TKR performs this wiring service to every unit in the building even though TKR's eventual customer base will include only 40 to 80 percent of the units that were actually wired. "Post-wiring" is performed after an MDU is already constructed, and is more difficult and expensive. To perform a post-wiring, TKR runs conduits through the hallways and stairwells or other suitable locations in the building, in accordance with building codes and the owner's specifications. As with pre-wiring, each unit generally is provided with access to cable service, even though only a percentage of the inhabitants in the building will actually subscribe. Most wiring of MDUs is performed as a result of a contractual relationship between the operator and the building owner/manager. These contracts provide many benefits to the owner/manager of the building, and in return generally specify that the ownership of the wiring in the common areas remains with the cable operator.

In addition to strict monetary costs, TKR has been required to expend considerable effort simply to gain access to MDU properties and to comply with what have often been difficult preconditions for MDU wiring. TKR's access to MDU property has been difficult even in instances where TKR has offered to perform the wiring at no cost. Building owners, building associations, condominium committees and other entities have imposed a variety of difficult wiring restrictions on TKR. Intricate wiring conditions have included such things as fishing walls thorough multiple floors in order to conceal wiring to the greatest extent possible.

In many respects, the wiring of the common areas in an MDU is more like the construction of a cable system in municipal rights-of-way. To restrict an operators access to individual units in a building or development is akin to requiring a cable operator to remove its cable from telephone poles simply because some home owners on a block wish to subscribe to a different provider. Moving the current point of demarcation in MDUs will have this very deleterious effect.

The proposed change in demarcation point for MDUs is neither mandated nor permitted under current law. Section 16(d) of the 1992 Cable Act, regarding the disposition of customer premises wiring, and the House and Senate Reports on the 1992 Cable Act, all make clear that Section 16(d) applies only to wiring "inside the home."[5] This reference to cable wiring "inside the home" clearly does not apply to the hallways and other common areas of an MDU, which are not "inside the home" of any cable subscriber. Instead, the hallways and common areas of an MDU are located on the property of the owner of the MDU that is not "inside the home" of any resident of the building. Therefore, unlike the Commission's previous home

[5] Senate Report at 23. House Report at 118.

wiring rules, the Commission is not empowered by any specific Congressional directive which compels the Commission to relocate the demarcation point for cable inside wiring. Moreover, moving the demarcation point in MDUs will interfere with free market negotiations between business operators. This interference is not only not contemplated by the 1996 Telecommunications Act, it is actively discouraged.

Because the cable operators own the inside wiring in MDUs, if the Commission were to require operators to surrender control of that wiring, such action would constitute a taking, which is protected by the Fifth Amendment of the Constitution. Any compensation to the operator for less than the market value of the facilities placed in the common areas of an MDU would not only be an unconstitutional taking, it would also severely hamper the development of a competitive marketplace. Unless operators can recover the value of their investment in the public areas of MDUs, there will be limited reason for them to take the risk of trying to develop competitive services. Just as the Commission found with residential rate regulation, when the opportunity for repayment or risk is limited , development and expansion ceases.

III. RIGHT TO ACCESS

The uneven interpretation of section 521(a)(2) of the Communications Act by local district courts has not only frustrated Congress's intent to grant full right of way access with the grant of a franchise, it is also a major impediment to the development of a competitive communications marketplace. It has also resulted in the limitation of choice for individual customers.

In the typical situation, one provider will receive the right to provide broadband services to an MDU. That provider will devote significant resources to the wiring and development of the property, as described above. Typically, the original provider retains ownership of the facilities up to the individual unit as a condition of providing service to the MDU. When a competitor seeks access to the MDU, it will typically contact the property owner or manager and request exclusive access to the MDU. If such access is granted, the original provider is typically locked out of the MDU, and all of the original operator's facilities from the lock box to the subscriber's unit is appropriated by the new provider. Often the individual unit is not given any choice in the selection of a provider. Such appropriation of the incumbents' facilities and limitation on subscriber choice is both outright theft and a violation of the subscriber's First Amendment right to choose a speaker. It also results in a significant lessening of competition.

TKR, therefore, requests that the Commission make the following findings with respect to access to MDUs and private residential developments:

* A property owner that grants an easement or right of way to one broadband provider may not restrict access to those easements or rights of way to a subsequent provider.

* A subsequent provider must comply with the same requirements for use as the original provider.

* A subsequent provider may not appropriate the facilities of the earlier provider up to the point of demarcation.

* Where an individual unit requests service from a provider, that provider should be permitted access to the unit.

* The distinction between external rights of way and rights of way in interior common areas should be eliminated.

* Violations of these provisions by MDUs and private community owners/managers should be preempted.

If the Commission truly wants to promote competition, it must allow providers access to individual customers and at the same time protect the legal rights of the providers to maintain control of their facilities. The common practice today is for owners/managers of MDUs to allow competitors access to their premises and the right to seize the incumbent's equipment. Such actions do not promote competition, they destroy competition.

IV. CONCLUSION

TKR favors the elimination of unfair barriers to competition and in fact is among those companies looking forward to robust competition from different service providers who will offer different packages of advanced communications services in different ways. TKR believes that competition in the communications industry works to the benefit of consumers and communications service providers alike. In a one-wire universe, however, a robust market for communications services will be slow to develop. TKR therefore opposes any proposal to relocate the demarcation point for cable inside wiring in MDUs, since such a proposal will promote a one-wire universe and thereby impede the development of advanced telecommunications, information and entertainment services. TKR also respectfully requests the Commission to take affirmative steps to guarantee access to MDUs without allowing the seizing of the incumbent's equipment by a competitor.

Wherefore, for the reasons stated in these Comments, TKR respectfully requests that the Commission decline to adopt rules moving the current cable demarcation point for MDUs to any point farther than 12 inches outside of where the cable wire enters the subscriber's

individual dwelling unit, and to clarify the applicability of section 621(a)(2) of the Communications Act.

Respectfully submitted,

TKR CABLE COMPANY

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